

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
AUGUST 1999 SESSION

FILED
November 30, 1999
Cecil CROWS ON, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

v.)

LINDA JUNE CROSS,)

Appellant.)

No. 03C01-9810-CR-00358

Cumberland County

Honorable Leon Burns, Jr., Judge

(First degree murder)

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OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
Judge

OPINION

By the grant of a delayed appeal, the defendant, Linda June Cross,
appeals her conviction by a jury in the Cumberland County Criminal Court for first

degree murder. The defendant was given a life sentence in the Tennessee Department of Correction. The defendant contends that

(1) the trial court violated her right to compulsory process by refusing to grant her a continuance until after the disposal of the case of Roy Jenkins, a severed co-defendant;

(2) the trial court should have permitted her to call a severed co-defendant, Roy Jenkins, as a witness even though his attorney confirmed that he would assert his Fifth Amendment privilege against self-incrimination;

(3) the trial court should have declared Marlene Kimball to be an accomplice as a matter of law and instructed the jury on the need for her testimony to be corroborated;

(4) the cumulative effect of these errors prejudiced the outcome of her trial.

We affirm the trial court's judgment of conviction.

The defendant was indicted along with Joseph Norman and Roy Jenkins for the first degree murder of Sharon Elise George. The trial court granted the defendant's motion to sever her case from that of her co-defendants.

Ed Willis testified that on April 29, 1991, he was hunting with his son in Cumberland County when they discovered a human skull among fallen leaves one hundred twenty-five yards from the highway. He said that he reported this to the sheriff's office. The remains were determined to be those of the victim, who had been missing from Cleveland, Tennessee, since August 4, 1982.

Joseph Norman testified that he met the defendant in 1981 when he moved in with his mother upon his release from prison. He said that his mother lived next door to the defendant. He said that the defendant was jealous of the victim, who was her ex-husband's girlfriend. He said that a few months before August of 1982, the defendant asked him if he knew anyone who could get rid of the victim. He said that he called the defendant and told her that he had found someone who wanted ten thousand dollars with thirty-five hundred dollars in advance to kill the victim. He testified that he had not actually found anyone and that he never intended to kill the victim. He said that the defendant met him and his girlfriend, Marlene Kimball, at the bank and gave him an envelope containing thirty-five hundred dollars. He said that he was not sure if Ms. Kimball knew why the defendant gave him the money.

Mr. Norman testified that within a few days, he moved to Victoria, Texas, with Ms. Kimball, her children, and Roy Jenkins. He said that they got an apartment and lived off the money that the defendant gave him. He said that when their money ran out, he had Ms. Kimball call the defendant and tell her that he had been robbed and cut. He said that Ms. Kimball called the defendant two or three times because she did not send the money immediately. He said that the defendant wired them between fifteen hundred and two thousand dollars and that Ms. Kimball picked up the money. He stated that Ms. Kimball probably knew why he was able to get money from the defendant even though he did not believe that he told her directly. He said that they then moved back to Tennessee into a furnished house owned by the defendant. He said that the defendant asked him when the job would be done, and he told her that he did not know. He said that the defendant also provided him with a 1966 Chevrolet.

Mr. Norman testified that he never planned to commit the murder, but a few days after he moved into the defendant's house, the defendant told him that the victim was alone in her room at the Scottish Inn and "now was the time to get it done." He said that the defendant gave him the victim's room number. He said that the defendant and her ex-husband both worked at Smith Motors and that the defendant told him that she had hidden a tape recorder in her ex-husband's office to learn the victim's room number. He said that the defendant told him that her ex-husband was supposed to pick up the victim.

Mr. Norman testified that he and Mr. Jenkins drove to the Scottish Inn. He said that Mr. Jenkins knocked on the victim's door and told her that the defendant's ex-husband had sent them to pick her up. He said that the victim got her purse and left with them. He said that he had never seen the victim before, and he denied having any plan to rob the defendant's ex-husband. He said that as they were leaving the hotel, he saw the defendant watching them from a parking lot across the road. He said that they drove six or seven miles from the hotel and took the victim out of the car. He said that he cut the victim's throat several times while Mr. Jenkins held her. He said that he became sick, and then Mr. Jenkins took the knife and cut her throat. He said that Mr. Jenkins also hit the victim on the head with a rock.

Mr. Norman testified that he and Mr. Jenkins drove back to the house. He said that he had Ms. Kimball call the defendant from a pay telephone at the end of the street and tell her that the job was done. He stated that he was not sure if Ms. Kimball knew what this meant but that she probably did. He said that the defendant came to the house, and he and Mr. Jenkins rode with her back to the site of the killing. He said that when they got there, he realized that the victim was still alive because she had crawled from where he had left her. He said that they wrapped the victim in a sheet, put her in the defendant's trunk, and returned to the house. He said that everyone except the defendant got in his car, and with the defendant following in her car, they drove to Rockwood, Tennessee. He said that when they stopped for gasoline, he could hear the victim moving around in the defendant's trunk.

Mr. Norman testified that they all went to his brother's house in Rockwood. He said that Ms. Kimball and her children stayed at his brother's house, and he and Mr. Jenkins went up the mountain with the defendant. He said that they drove thirty-five to forty minutes, turned off the highway onto a logging road, and went about one hundred yards. He stated that the victim was still alive when he took her out of the trunk. He said that the defendant handed him her son's shotgun, which she had brought with her in her car. He said he shot the victim in the upper body. He said that he and Mr. Jenkins dug a shallow grave with a shovel from the defendant's car, buried the body, and put trash over the grave. He said that during this time, the defendant stood at the end of the road to make sure that no one approached.

Mr. Norman testified that they returned to his brother's house. He said that he broke the gun and threw it into the woods across from the house. He stated that the defendant stayed with Ms. Kimball while he and Mr. Jenkins went to the lake and destroyed the victim's purse and its contents. He said that a couple of days later, he, Mr. Jenkins, and Ms. Kimball moved to Kingsport, Tennessee. He said that the defendant gave them money before they left and later wired them four or five hundred dollars. He said that he was not sure why he went through with the killing and that he was afraid that the defendant would have had done something to his family.

Mr. Norman testified that he was currently in prison for second degree murder, burglary, and escape. He said that he was charged with the first degree murder of the victim and that he had entered into a plea for a life sentence to be served consecutively to his current forty-year-sentence. Mr. Norman denied telling the defendant that she would be better off if he got rid of her ex-husband for her. He admitted that he had performed other jobs for the defendant before she contacted him about the murder. He said that the defendant had hired him to put sugar in her ex-husband's gas tank and to burn down his trailer. He said that he did not recall the defendant's telling him that her ex-husband went to car auctions in Nashville on Wednesday mornings, that the victim went with him, or that he always carried a lot of money. He admitted that he took a ring from the victim's body before he buried her. He said that he later gave the ring to Ms. Kimball, who knew that it came from the victim.

Lonnie Cross testified that in August of 1982, he was divorced from the defendant and living with the victim, who had been his girlfriend for a year or two. He said that the victim was eighteen years old. He said that on August 4, 1982, he and the victim were staying at the Scottish Inn. He stated that on that morning, they planned to go to Nashville to buy cars for Smith Motors, where he worked. He said that he left the hotel between 8:30 and 9:00 a.m. to pick up the owner of Smith Motors, and he planned to return and get the victim. He stated that he stayed at Smith Motors for about thirty minutes and that he did not recall seeing the defendant there that morning. He said that when he returned to the hotel, the victim was not there, and the only item missing was the victim's purse. He said that around 1:00 p.m., he called Smith Motors from Nashville to see if the victim had come by the car lot. He said that he did not remember whether the defendant answered the phone.

Mr. Cross identified a picture of the victim, who had a chipped tooth and was wearing a brown belt with white lacing. He testified that no animosity existed between him and the defendant despite their divorce. He said that he later helped the defendant clean up a house that she owned which had partially burned. He said that he did not recall finding his son's shotgun in the wreckage. He said that his trailer had

burned shortly after he and the victim moved into it and that his truck stopped running because someone poured a five pound bag of sugar into it.

Erma Dale testified that she had worked with the defendant and that they were best friends in 1982. She said that the defendant hated the victim because the defendant was still in love with her ex-husband. She said that a short time before the victim disappeared, the defendant told her that the victim was going to be missing and was going to be "where Hoffa was." She said that the defendant told her that two men who were the defendant's neighbors were supposed to get the victim and cut off her hand so that the defendant would know that they got her. She said that the defendant mentioned a fifteen-hundred-dollar payment.

Ms. Dale testified that on August 4, 1982, her husband called her between 8:30 and 9:00 a.m. from his business next to Smith Motors and told her that the victim was missing. She said that she tried to call the defendant throughout the day and finally reached her between 3:00 and 4:00 p.m. that afternoon. She said that she told the defendant that if the defendant had anything to do with the victim's disappearance, then the defendant should return the victim or she was going to call the authorities. She said that the defendant laughed and said that the victim's disappearance was just a coincidence and that she did not have anything to do with it.

Ms. Dale testified that she did not mention either of these conversations with the defendant when she spoke with an investigator in 1986. She admitted that she gave this information for the first time after the victim's remains were discovered. She admitted that she told the police that she first learned of the victim's disappearance when her husband came home from work at 6:00 p.m.

Marlene Kimball testified that Joseph Norman was her ex-husband. She said that she had known Mr. Norman for six months in August of 1982. She said that in the summer of 1982, she and her children moved to Texas with Mr. Norman and Roy Jenkins. She said that before they moved, she saw Mr. Norman show his brother a large amount of money. She said that they did not attempt to find jobs in Texas but lived on Mr. Norman's money. She stated that when Mr. Norman ran out of money, he

would call the defendant or he would have her call the defendant. She said that the defendant sent them eight hundred dollars through Western Union, and they returned to Tennessee in August of 1982.

Ms. Kimball testified that they moved into a furnished house owned by the defendant. She said that the house did not have a telephone and that she did not remember a shotgun on the premises. She said that they had lived there a couple of days before the situation with the victim. She said that on August 4, 1982, she was awakened when Mr. Norman and Mr. Jenkins came into the house and started rushing around. She said that she did not know what the defendant, Mr. Norman, or Mr. Jenkins were doing that day. She said that she did not remember calling the defendant. She said that she and her children followed the defendant to Rockwood in Mr. Norman's car. She said that Mr. Norman and Mr. Jenkins rode with the defendant and that Mr. Norman's mother may have also been with them. She said that they were going to visit Mr. Norman's brother, Sam Norman. She said that when they were almost there, Mr. Norman got out and directed her to go on to his brother's house and wait for him.

Ms. Kimball testified that after Mr. Norman joined her at his brother's house, he had a rifle. She said that when his brother mentioned he would like to have that gun, Mr. Norman said, "Not this one, you wouldn't," smashed the gun against a tree, and threw it across the road. She said that they moved from Cleveland to Rockwood and then to Kingsport, Tennessee. She said that on the way to Kingsport, Mr. Norman gave her two rings. She said that she did not know where the rings came from at that time, but she learned in a subsequent argument with Mr. Norman that the rings came from the victim. She said that Mr. Norman took the rings away from her sometime thereafter.

Ms. Kimball testified that she did not recall the defendant ever being in her car. She said that she had heard the defendant talk about how much she hated the victim for taking her husband, whom she wanted back. On cross-examination, she admitted that she knew that Mr. Norman had killed the victim when she married him on February 14, 1983. She said that at the time, she did not know that the defendant had

offered to pay Mr. Norman to kill the victim or that the defendant gave Mr. Norman thirty-five hundred dollars at a bank. She said that she did not know why the defendant was wiring Mr. Norman money when they lived in Texas. She admitted that she had told Tennessee Bureau of Investigation (TBI) agents that she thought it was blackmail money. She said that within a day or two of the murder, Mr. Jenkins told her that Mr. Norman had cut the victim's throat. She said that Mr. Norman was dealing drugs around the time of the murder.

Dr. William Bass testified that he was a professor and director of the Forensic Anthropology Center at The University of Tennessee. He said that he worked as a member of the medical examiner's staff identifying skeletal remains. He said that on April 29, 1991, the TBI contacted him to identify remains of a teenage white female with chipped teeth. He said that the body was clothed when buried and that he found a black belt edged with white stitching around the waist. He stated that after taking a bitewing x-ray, he identified the remains as those of Sharon Elise George. He said that x-rays of the remains revealed a fracture to the back of the skull. He stated that this skull fracture could have resulted from the victim's being hit with a large, flat rock. He said that he found lead pieces, which were most likely shotgun pellets, in the vertebrae. He stated that the fragmented cervical bones in the upper body indicated that the victim had been shot with a shotgun.

The defendant testified that she divorced Lonnie Cross in August of 1976, but they continued to live together until January of 1982. She said that the victim was one of a long line of women who had affairs with her ex-husband and that she disliked them all. She said that she met Joseph Norman in 1981 when he moved in with his mother who was her neighbor. She described herself as Mr. Norman's friend and part-time employer and said that he did odd jobs and lawn work for her. She said that he moved to Texas in the summer of 1982. She denied ever offering him ten thousand dollars to kill the victim or meeting him and Ms. Kimball at the bank to give them thirty-five hundred dollars.

The defendant testified that in June or July of 1982, Mr. Norman's mother told her that Mr. Norman had been wounded in a knife fight at his Texas apartment

complex, that the children living with him were sick and hungry, and that Mr. Norman and his companions had no money. She said that Mr. Norman's mother asked her if she could loan them some money so that they could return to Tennessee. She said that she loaned them between three hundred fifty to five hundred dollars. She said that she drove Mr. Norman's mother, who had instructions on where to send the money, to the Western Union office. She said that she expected Mr. Norman's mother to pay her back.

The defendant testified that when Mr. Norman returned, he offered to renovate a house she owned in exchange for her allowing him to stay there. She denied buying a car for Mr. Norman. She said that Mr. Norman witnessed several arguments between her and her ex-husband, including one in which her ex-husband was drunk and called her repeatedly. She said that Mr. Norman told her that she should let him kill her ex-husband for her. She stated that she did not think that Mr. Norman was serious and she just "laughed it off." She said that Mr. Norman then asked if she would mind if he robbed her ex-husband. She said that she was angry with her ex-husband and the victim at that time, and she said that she did not care what Mr. Norman did to him. She said that she told Mr. Norman that she wished that both her ex-husband and the victim were dead. She stated that Mr. Norman knew how much money her ex-husband carried because Mr. Norman had seen him open his wallet to give money to their children or to pay Mr. Norman for lawn work. She said that Mr. Norman asked her which car sales her ex-husband would be attending, what kind of car he would be driving, and where he and the victim would be staying.

She said that Mr. Norman called her on August 3, 1982, and asked her what kind of car her ex-husband would drive home. She admitted that this differed from the statement she gave the police in which she said that she called Mr. Norman. She testified that she could not have called him, however, because he did not have a telephone. She stated that her ex-husband normally took the victim with him to the car sales on Wednesday mornings and that he did not come to the car lot before leaving for the sale. She said that on August 4, she got to work between 8:00 and 8:30 a.m., which was her usual time. She said that her ex-husband came to the car lot between 9:00 or 9:30 a.m. and left around 10:00 a.m. with the owner. She said that she was

relieved when her ex-husband arrived because Mr. Norman had told her that he planned to rob him in the hotel parking lot that morning. She said that between 10:15 and 10:30 a.m., Mr. Norman called her, told her that the victim's body was in the trunk of his car, demanded that she come to the house, and asked her how much money she had. She said that she was afraid Mr. Norman would harm her if she did not go. She said that around 11:00 a.m., she went to the bank, filled her car with gasoline as Mr. Norman had instructed, and drove twenty-five minutes to the house.

The defendant testified that Mr. Norman forcefully took her keys even though she expressed concern about his using her car. She said she gave him six hundred dollars. She said that he told another man, whom she did not know, to get gloves and a blanket. She said that Mr. Norman got the shovel from beside the porch. She said that she stayed inside until she heard them drive away. She stated that she later learned that the other man was Roy Jenkins when she picked him out of a photographic lineup for the police. She said that Ms. Kimball returned shortly after Mr. Norman left and that Ms. Kimball drove her back to her office. She said that she told Ms. Kimball what Mr. Norman had done, and Ms. Kimball seemed stunned.

The defendant testified that she arrived back at her office between 12:30 and 12:45 p.m. She said that her ex-husband called at 1:00 p.m. and asked whether the victim had called the office. She said that she did not tell him what she knew about the victim because she was afraid. She said that she called Erma Dale that afternoon and told her that she thought that her neighbor had done something with the victim. She said that Ms. Dale advised her to call the authorities, but she did not. She said that Mr. Norman returned with her car shortly before 5:00 p.m. She said that he drove her to his mother's house and then she went home. She said the defendant continued to ask her for money over the next several years and once threatened her daughter.

She said that her son kept a shotgun in the house where Mr. Norman stayed. She said that she never gave this gun to Mr. Norman and that she last saw it about three months later when she and her ex-husband recovered it from the house after it had burned. She said that the house actually belonged to the owner of Smith Motors and that he purposely set fire to it. She said that she was indicted as a

conspirator in this arson, but the charges were dismissed. She said that she gave a statement to the police after the victim's remains were discovered. She said that the agents put words in her mouth and that she signed the statement anyway because she was in the process of having a nervous breakdown.

The defendant testified that she had pled guilty to embezzling three thousand six hundred sixty dollars on May 14, 1982. She said she believed that she took only fifteen hundred dollars. She said that about twenty days after the victim disappeared, she lied to an agent when she told him that she thought the victim was staying with someone in Cleveland. She admitted that after she spoke with Mr. Norman on August 4, she knew that he was going to use her car to remove the victim's body, and that is why she took her car to him.

Detective Danny Chastain of the Cleveland Police Department read the defendant's statements into evidence. He said that regarding Mr. Norman's plan to rob Lonnie Cross, the defendant said she told Mr. Norman that he could have the money and she would have the satisfaction of revenge. The defendant said that she thought she would have a better chance with her ex-husband for her children's sake if the victim were out of the picture. Regarding the six hundred dollars that she gave Mr. Norman on August 4, the defendant said that she felt obligated to pay him because she knew he had killed the victim. She said that Mr. Norman needed the money and had to get out of town. She said that when Mr. Norman brought her car back to the car lot that day, she asked him if he had removed any personal effects belonging to him, the victim, or his friend from her car. She said that she was concerned about being linked to the victim's murder. She said that Mr. Norman and the victim did not know each other and that he had killed the victim for money.

Detective Chastain testified that in a second statement, after relating more details of the events of August 4, 1982, the defendant said that she paid Mr. Norman on different occasions because she was afraid that he would drag her further into the victim's killing. She also said that she paid him because he threatened her daughter. Detective Chastain stated that the words, "Nor am I sick" were added to the rights waiver the defendant signed before giving the first statement. He said that he did not

recall visiting the defendant the next day at the hospital where she was admitted by Dr. Scharoff of Hiawassi Mental Health Center.

I. CONTINUANCE

The defendant contends that the trial court erred in refusing to grant her a continuance until the court resolved the case of Roy Jenkins, one of her severed co-defendants. She claims that Mr. Jenkins' sworn statement favorably contradicted Joseph Norman's statement on the degree of the defendant's involvement in the murder. She argues that calling Mr. Jenkins as a witness while charges were pending against him would have been ineffective because it is reasonable to expect that he would have asserted his Fifth Amendment privilege against self-incrimination. Therefore, she claims that the trial court violated her right to compulsory process by denying her motion for a continuance. The state contends that the trial court did not abuse its discretion by denying the continuance and that the defendant suffered no prejudice because Mr. Jenkins' statement inculpated her.

The trial court granted the defendant's motion to sever her case from that of her co-defendants, Roy Jenkins and Joseph Norman. Before the jury was sworn, the defendant renewed her oral motion that her case be continued until after the court disposed of Mr. Jenkins' case. The court denied the motion, questioning whether any co-defendant has the right to be "last in line." The defendant made the written statements of Mr. Norman and Mr. Jenkins exhibits to her motion.

The granting of a continuance rests within the sound discretion of the trial court. Moorehead v. State, 219 Tenn. 271, 274-75, 409 S.W.2d 357, 358 (1966). We will reverse the denial of a continuance only if the trial court abused its discretion and the defendant was prejudiced by the denial. State v. Morgan, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991). In order to show prejudice, the defendant must demonstrate that a different result might reasonably have been reached if the trial court had granted the continuance. Id. In Morgan, this court examined the denial of a continuance, which the defendant sought in order to have additional time to search for a witness. We recognized that the trial court has no discretion to deny the defendant's fundamental constitutional right to compulsory process regarding the procuring of witnesses when

the witness is material. Id. Furthermore, when the defendant is legitimately exercising his right to secure witnesses, the trial court must give the defendant “a reasonable opportunity . . . to make the process effective and, if necessary for this purpose, a reasonable adjournment of the trial” Id. (quoting State v. Rossi, 43 A.2d 323, 326 (R. I. 1945)).

When seeking a continuance due to the unavailability of a witness or evidence, the defendant must file a written motion setting forth the basis for the continuance and must file an affidavit, which alleges:

(a) the substance of the facts that the [defendant] expects to prove through the unavailable witness or evidence, (b) sufficient facts to establish the relevance and materiality of the testimony or the evidence, (c) the testimony of witness or evidence would be admissible, if available, (d) the testimony or evidence is not merely cumulative to other evidence, (e) the witness or evidence will be available at a later date, and (f) diligence was exercised to obtain the presence of the witness or evidence.

State v. Bennett, 798 S.W.2d 783, 787-88 (Tenn. Crim. App. 1990) (footnotes omitted).

“As a general rule, mere conclusory allegations or opinions, standing alone, are insufficient to support the granting of a continuance.” Id. at 788.

In Bennett, this court affirmed the trial court’s denial of a continuance of the trial until after the trial court disposed of a co-defendant’s case. The court noted that the affidavit accompanying the motion for a continuance failed to show how the co-defendant’s testimony would be exculpatory or favorable. In this case, the defendant contends that Mr. Jenkins’ testimony would have been favorable because it would have contradicted the testimony of the state’s only other eyewitness, Mr. Norman. She asserts that Mr. Jenkins’ statement places most of the blame for the victim’s death on Mr. Norman and reveals that the defendant was not present during the murder or the disposal of the body.

After reviewing Mr. Jenkins’ statement, we agree with the state that the statement is not favorable to the defendant, but, in fact, inculpates her. Although the statement does not place the defendant at either the location where the victim’s throat was cut or the grave site, Mr. Jenkins states that the reason that Mr. Norman killed the victim was that “a woman named Linda wanted her out of the way, so that she could get

back with Lonnie.” Mr. Jenkins relates that Mr. Norman told him that a woman had offered to pay ten thousand dollars to have a girl killed. He states that the defendant met them on the mountain in Rockwood after they had buried the victim’s body and asked Mr. Norman, “Is it done?” He said that both the defendant and Mr. Norman threatened him and his family if he told anyone. Therefore, we hold that the trial court’s denial of a continuance was not an abuse of discretion, nor is it likely that a continuance would have yielded a different outcome for the defendant.

II. RIGHT TO CALL ROY JENKINS

The defendant contends that the trial court violated her right to compulsory process by not allowing her to call Roy Jenkins as a witness even though Mr. Jenkins’ attorney assured the court that his client would assert his Fifth Amendment privilege against self-incrimination. “The calling of a witness who will refuse to testify does not fill the purpose of compulsory process, which is to produce testimony for the defendant.” State v. Dicks, 615 S.W.2d 126, 129 (Tenn. 1981). The right against self-incrimination is paramount to a defendant’s right to compulsory process. Id.; State v. Zirkle, 910 S.W.2d 874, 890 (Tenn. Crim. App. 1995). The trial court has the responsibility of deciding whether a witness properly asserted his Fifth Amendment right. Zirkle, 910 S.W.2d at 890. Only a plain abuse of the trial court’s authority warrants a reversal. Id. Here, Mr. Jenkins was charged with the same crime as the defendant, and his attorney stated that his client would assert his right against self-incrimination to any question other than his name. The trial court properly refused to allow the defendant to call Mr. Jenkins.

The defendant states that her purpose in calling Mr. Jenkins was to cross-examine him about his statement, thereby presenting the substance of the statement to the jury. Our supreme court has recognized that “a jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege against self-incrimination, whether those inferences be favorable to the prosecution or the defense.” Dicks, 615 S.W.2d at 129. This applies equally to the witness’s invocation of his right in response to particular questions. Id. Thus, the defendant’s desire to present Mr. Jenkins’ statement to the jury by questioning him about it does not overcome Mr. Jenkins’ Fifth Amendment privilege.

As a related matter, the defendant contends that the trial court erred in denying her motion to reopen the proof in order to admit Mr. Jenkins' statement into evidence. The defendant argues that because Mr. Jenkins was unavailable, the statement is admissible under the hearsay exceptions for former testimony and statements against interest. See Tenn. R. Evid. 804(b)(1), (3). The state argues that the defendant waived this issue by failing to include it in her motion for new trial. Without addressing the admissibility of the statement, the state also argues that the failure to admit the statement was harmless beyond a reasonable doubt because the statement inculcates the defendant and contradicts her testimony.

After both the state and the defense rested, the defendant moved the court to reopen the proof in order to introduce Mr. Jenkins' written statement. The trial court denied the motion, stating that reopening the proof at that time would be improper. The court also expressed doubt that the statement would be admissible even if the proof were reopened. Initially, we conclude that the defendant's failure to raise this issue in her motion for new trial waives its review absent plain error that affects the defendant's substantial rights. T.R.A.P. 3(e); Tenn. R. Crim. P. 52(b). Accordingly, we will review this issue for the presence of plain error.

"[I]nvoication of the privilege against self-incrimination renders a witness unavailable." State v. Howell, 868 S.W.2d 238, 250 (Tenn. 1993). The defendant argues that Mr. Jenkins' statement to TBI agents was testimony given in a deposition and, therefore, falls within Rule 804(b)(1), Tenn. R. Evid. This exception applies to:

Testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination.

Tenn. R. Evid. 804(b)(1). The exception contemplates that "the prior testimony must have been given under oath in a formal proceeding." Neil P. Cohen et al., Tennessee Law of Evidence, § 804(b)(1).2 (3d. ed. 1995). Mr. Jenkins did not make his statement under oath or at a formal proceeding. This exception does not apply.

The defendant also contends that Mr. Jenkins' statement is admissible as a statement against interest because it implicates him in the victim's murder. Rule 804(b)(3), Tenn. R. Evid., sets forth the hearsay exception for statements against interest:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

We agree that Mr. Jenkins' statement falls within this exception because he admitted that he helped Mr. Norman put the victim in the trunk of the car after Mr. Norman cut her throat, although he realized that the victim was still alive. Mr. Jenkins said he rode with Mr. Norman to the mountain and helped dig the grave. He said he helped Mr. Norman carry the victim to the grave by holding her feet and saw the victim grab for Mr. Norman. He stated that he saw Mr. Norman shoot the victim and bury her. Thus, Mr. Jenkins' statement was admissible as an exception to the hearsay rule to the extent it is a statement against interest.

Nevertheless, we believe that the failure to admit the statement was harmless beyond a reasonable doubt. Although Mr. Jenkins' statement corroborates the defendant's testimony that she did not go to the scene of the initial attack or to the grave site, it otherwise inculcates the defendant in the murder. Because the failure to admit the statement was harmless, we do not consider it to be plain error that interferes with the defendant's substantial rights. See Tenn. R. Crim. P. 52(b).

III. ACCOMPLICE INSTRUCTION

The defendant contends that the trial court should have declared Marlene Kimball to be an accomplice as a matter of law and instructed the jury on the need for Ms. Kimball's testimony to be corroborated. She argues that the failure to declare Ms. Kimball an accomplice as a matter of law not only allowed Ms. Kimball's testimony to go uncorroborated but also allowed her testimony to corroborate the testimony of another accomplice, Mr. Norman. The state argues that because the evidence of Ms. Kimball's knowledge of and involvement in the victim's murder is disputed, the trial court properly

instructed the jury that they were to determine whether Ms. Kimball was an accomplice as a matter of fact.

A defendant cannot be convicted of a crime in Tennessee on the uncorroborated testimony of an accomplice. See Sherrill v. State, 204 Tenn. 427, 435, 321 S.W.2d 811, 814 (1959). An accomplice is defined as a person who knowingly, voluntarily and with common intent unites with the principal offender in the commission of the crime. State v. Perkinson, 867 S.W.2d 1, 7 (Tenn. Crim. App. 1992). “A common test is whether the alleged accomplice could have been indicted for the offense.” Id. When it is clear and undisputed that the witness participated in the crime, the trial court decides as a question of law whether he or she is an accomplice. Id. The question becomes one of fact for the jury to decide when the facts are in dispute or susceptible to different inferences. Id. In other words, when a witness denies involvement in the crime, the question of whether he or she is an accomplice is one of fact to be submitted to the jury with proper instructions from the court on how to consider such testimony. Ripley v. State, 189 Tenn. 681, 687, 227 S.W.2d 26, 28 (1950).

In this case, Mr. Norman testified that he believed that Ms. Kimball knew about the plan to murder the victim, but Ms. Kimball denied that she knew about the murder until Mr. Jenkins told her a day or two after it occurred. Because the facts surrounding Ms. Kimball’s involvement were in dispute, the trial court properly instructed the jury that they should decide whether Ms. Kimball was an accomplice as a matter of fact.

IV. CUMULATIVE ERROR

The defendant contends that she was prejudiced by the cumulative effect of the errors occurring at trial. She argues that because the jury was deprived of the testimony of Roy Jenkins, whether live or through his statement, and because Marlene Kimball was not declared an accomplice as a matter of law, she was effectively denied her right to challenge the testimony of Joseph Norman. Having determined that the failure to admit Mr. Jenkins’ statement was harmless beyond a reasonable doubt and finding no other error, we hold that no cumulative error exists.

In consideration of the foregoing and the record as a whole, we affirm the judgment of the trial court.

Joseph M. Tipton, Judge

CONCUR:

John Everett Williams, Judge

Alan E. Glenn, Judge